BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2014-346-WS

IN RE:)) Application of Daufuskie Island Utility) Company, Inc. for Approval of an) Increase for Water and Sewer Rates,) Terms and Conditions.) _____)	**DIUC SUBMISSION IN SUPPORT OF REQUEST FOR REPARATIONS**

NOW COMES THE APPLICANT, Daufuskie Island Utility Company, Inc. ("DIUC"), pursuant to the Order Approving Settlement and Further Procedure entered by this Commission on March 30, 2021 ("Order Approving Settlement" or "Order 2021-132"), to submit the following in support of its request for reparations and restitution. In addition to this submission and its exhibits, DIUC relies on and incorporates herein the record of proceedings and filings to date in Docket 2014-346-WS as well as those in South Carolina Supreme Court Appellate Case 2016-000652 and Case 2018-001107.

PROCEDURAL HISTORY

On June 9, 2015, DIUC, the sole provider of water and sewer service to a service area that encompasses Daufuskie Island, Beaufort County, South Carolina, applied to this Commission for approval of a new schedule of rates and charges for water and sewer service ("the Application"). The Application was filed pursuant to S.C. Code Ann. Section 58-5-240 and 10 S.C. Code Ann. Regs. 103-712.4.A and 103.512.4.A. In its Application, DIUC utilized a historic test year – the twelve months ending December 31, 2014, with known and measurable adjustments for 2015 expectations.

On July 23, 2015, the Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association, (collectively "Intervenors") filed a Petition to Intervene, which this Commission granted. The South Carolina Office of Regulatory Staff ("ORS") also appeared via counsel.

The parties participated in discovery and a hearing date was scheduled. On the afternoon of October 27, 2015, the day before the scheduled hearing on the Application, the Intervenors served and filed a document which purported to be a "Settlement Agreement." Pursuant to the purported "Settlement Agreement," ORS and the Intervenors agreed to stipulate to "all of the adjustments made by the ORS, with the exception that the ORS amended its bad debt allowance to utilize the allowance proposed by [DIUC] in its Application. No other changes were made by ORS in reaching the Settlement." Letter from Pringle to Hon. Boyd with Settlement Agreement, October 27, 2015.

On December 8, 2015, the Commission entered its Order Approving Settlement Among Certain Parties and Ruling on Application for Adjustments and Rates. Making this determination, the Commission adopted every adjustment proposed by ORS in the testimony and the "Settlement Agreement," effectively rejecting all of DIUC's testimony, evidence, and analysis.

In an effort to explain the errors inherent in the Commission's Order Approving the Settlement Agreement and the calculations of ORS and the Intervenors, on December 21, 2015, DIUC filed a Petition for Reconsideration and/or Rehearing. In its Petition for Reconsideration, DIUC addressed the adjustments for property taxes; management fees; rate case expenses; bad debts; and rate base, including evidentiary matters as well as the Commission's failure to include the values of DIUC's elevated storage tank and related facilities and other utility plant in service.

In summary, the Petition for Reconsideration explained that the Order's adjustments were without factual foundation and ignored measurable expenses and the rate of return and operating margins stated in the Order were entirely illusory. *See* Petition for Reconsideration, December 21, 2015. By Order No. 2016-50 dated February 25, 2016, the Commission denied DIUC's Petition for Reconsideration and/or Rehearing. DIUC appealed.

In the appeal, DIUC asked the Supreme Court to reverse Order 2015-846's adoption of the ORS-Intervenors Settlement Agreement and the five specific adjustments adopted by the Commission via the Settlement Agreement. The multiple adjustments on appeal were Order 2015-846's adjustments to:

- Property Taxes;
- Plant In Service;
- Bad Debts;
- Management Fees; and
- Rate Case Expenses.

After review of the briefing and oral argument, the Supreme Court ruled Order 2015-846 "contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission." *DIUC v. S.C. Office Reg Staff*, 420 S.C. 305, 316, 803 S.E.2d 280, 286 (2017).[1] Accordingly, the Court reversed and remanded the matter "for a new hearing as to all issues." *Id.* The Court further explained, *"*While we are reversing and remanding for a new hearing as to all issues, in order to provide guidance to the Commission on remand, we address three allegations of error raised by DIUC in this appeal." *Id.*

[1] The Supreme Court framed the issue as: "Were the Commission's findings of fact and conclusions with respect to property taxes, management fees, rate case expenses, rate base, and bad debt supported by substantial evidence in the record?" *DIUC I*, 420 S.C. 305, 313, 803 S.E.2d 280, 284 (2017) ("*DIUC I*").

The three allegations specifically addressed by the Court were:

- Bad Debt Adjustment (finding downward adjustment was "unsupported by the evidence in the record");
- Portion of Adjustment to DIUC's Utility Plant In Service (finding exclusion of the Elevated Tank Site was "unsupported by the substantial evidence in the record"); and
- Property Tax Adjustment disallowing amounts required by DIUC's agreement with Beaufort County (finding the payments were due per contract and should be recovered as "significant known expenses incurring after the test year").

DIUC I, 420 S.C. 305, 803 S.E.2d 280 (2017).

On remand to the Commission, the parties asserted different positions regarding how the Commission should address rehearing. With regard to the Utility Plant In Service, DIUC suggested the Commission adopt the Supreme Court's ruling as to inclusion of the Elevated Tank Site. DIUC stated:

> No additional testimony or discovery on the Elevated Tank Site and associated equipment is necessary, except to summarize for the Commission the amounts to be included under the Supreme Court's ruling that the Elevated Tank Site and associated equipment must be included in calculating Plant in Service.

Applicant's Proposal for Procedure Following Remand, filed October 4, 2017. With regard to the other items excluded from Utility Plant In Service in Order 2015-846 but that were not specifically itemized by the Court, DIUC stated:

> Beyond its holding as to the Elevated Tank Site, the Supreme Court did not specifically address that Order 2015-846's adoption of ORS's downward adjustment of Plant In Service included more than just the value of the Elevated Tank Site; the adjustment also reflects "capital improvements, non-allowable plant, adjustments from the previous case not made by DIUC and retirements through July 31, 2015." Hearing Tr. at 496. However, ORS (and therefore Order 2015-846) never explained what amount was included for the Elevated Tank Site versus these other items. DIUC intends to present limited prefiled testimony addressing this

> issue, which was also the subject of ample testimony by DIUC in the initial proceeding.

Id. DIUC also requested that the Commission forego further costly and time consuming discovery.

The Intervenors endorsed a broader scope for the rehearing and discovery, as explained by Order No. 2017-59-H, wherein Hearing Officer Butler wrote:

> … based on the language in the opinion of the Supreme Court, that the "de novo" terminology clearly means that the Court intended that the Commission hold a new hearing on all issues in the case. Further, since the Commission will hold a new hearing on all such issues, the Commission's discovery rules are clearly applicable.

Order 2017-59-H (Docket # 272504, October 11, 2017).

Pursuant to Order 2017-59-H, the parties participated in discovery and prepared for a *de novo* rehearing. That rehearing was convened before the Commission on December 6, 2017. Recognizing that DIUC could not obtain another bond in order to keep its proposed 108.9% rate increase in effect, on December 20, 2017, the Commission issued a Directive approving an 88.5% rate increase to be billed with DIUC's January 1, 2018, billing for service provided during the last quarter of 2017. Following the rehearing the parties submitted proposed orders and on January 31, 2018, the Commission entered its full decision, docketed as Order No. 2018-68 ("Order on Rehearing"). DIUC filed a timely Petition for Reconsideration and/or Rehearing on February 20, 2018. The DIUC Petition asserted that although the Order on Rehearing addressed many of the complex issues presented in this case and significantly reduced the outstanding questions, the Commission erred in its downward adjustment to DIUC's proposed Rate Case Expenses, Rate Base/Utility Plant In Service, and Accumulated Depreciation/Depreciation Expense. *See* DIUC's Petition for Reconsideration of Order on Rehearing, February 20, 2018. By Order No. 2018-346 dated May 16, 2018, the Commission denied DIUC's Petition for Reconsideration.

On June 13, 2018, DIUC served its Notice of Appeal of Order No. 2018-68 and Order No. 2018-346. The Office of the Clerk of the Supreme Court assigned this second appeal Appellate Case No. 2018-001107. As set forth in Appellant's Brief, DIUC sought "reversal of the Commission's Order on Rehearing because the Commission erred in excluding $542,978 from DIUC's Rate Case Expenses and the Commission erred in removing $699,631 from DIUC's Rate Base/Utility Plant In Service." Appellant's Brief at 3 (Case No. 2018-001107).

Oral argument was held before the Supreme Court on April 18, 2019. At oral argument counsel was questioned by members of the Court regarding both issues on appeal – the Order on Rehearing's exclusion of Rate Case Expenses and the Order on Rehearing's reduction to Utility Plant In Service. *See* Video Recording of April 18, 2019, Oral Arguments (available online at http://media.sccourts.org/videos/2018-001107.mp4). The Court also examined ORS counsel regarding the standards applied by the agency during the remand proceedings.

On July 27, 2019, the Supreme Court entered its decision reversing and remanding the matter back to the Commission. The strongly worded opinion expressed the Court's concerns. The Court categorized ORS's positions and actions on remand as "deeply troubling" and chastised ORS for its "misconduct," stating:

> We rightly demand more of governmental representatives—like ORS—than such an unprofessional approach to the legitimate financial interests of South Carolina businesses, and of South Carolina utility ratepayers. Likewise, we expect more respect for the rulings of this Court than administrative officers exhibit when they retaliate against parties who prevail against them on appeal.

Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff, 427 S.C. 458, 461, 832 S.E.2d 572, 573 (2019), *reh'g denied* (Sept. 27, 2019).

Following the Supreme Court's second remand in July of 2019, ORS and the Intervenors filed petitions for rehearing. The Supreme Court denied the petitions and remitted the matter to the Commission on September 27, 2019.

On November 15, 2019, counsel for DIUC filed a written request asking the Commission to take immediate action following the second remand. *See* Letter, Gressette to Hon. Boyd, November 15, 2019. In response, the Commission sought input from ORS. *See* Order 2019-824, December 4, 2019. Responding by letter dated December 6, 2019, ORS stated its position that an additional hearing was required but that if at that third hearing "DIUC submits no additional evidence, ORS is prepared to rest on the evidence it submitted in the initial two hearings." Letter, Bateman to Hon. Boyd, December 6, 2019. The Intervenors, however, took the position that Commission could not "rule on remand absent additional documentary or testimonial evidence to support its decision." Letter, Pringle to Hon. Boyd, January 16, 2020.

On April 14, 2020, DIUC filed a Motion for Disposition of Proceedings and Entry of Proposed Order on Second Remand. The Motion attached a 24-page proposed order. When no response to the motion was filed by any party to the proceeding, "DIUC respectfully [requested] the Commission consider the Motion at its earlier opportunity and, as set forth therein, grant the relief requested including entry of the proposed order." Letter, Gressette to Hon. Boyd, May 4, 2020.

DIUC's Proposed Order addressed correcting the Commission Order 2018-68's exclusion of Rate Case Expenses for Guastella Associates costs and its $699,361 reduction to Utility Plant in Service. The Proposed Order also explained DIUC's request that the Commission correct the insufficient and confiscatory nature of the rates included in Orders 2015-846 and 2018-68. DIUC asserted the correction should be made on the basis that the 108.9% rate increase should have been

in effect for service provided from October 1, 2017, through March 31, 2020, instead of the 88.5% rate increase. Further, with respect to the reversal of the refund/credit made to the customers on January 1, 2018, DIUC requested that in order to mitigate the impact on the customers, a separate surcharge be billed to the customers.

On May 20, 2020, the Commission entered Order 2020-382, which held DIUC's Motion for Disposition of Proceedings and Entry of Proposed Order on Second Remand in abeyance and instructed the parties and Commission staff to confer as necessary to schedule testimony deadlines for "a limited hearing … to consider rate case expenses, plant in service, and reparations." The parties conferred, proposed testimony deadlines, and pursuant to Order 2020-48H a hearing was scheduled for Thursday, September 3, 2020. *See* Order 2020-48H, June 9, 2020.

On June 16, 2020, DIUC filed the Second Rehearing Testimony of John F. Guastella with corresponding index and exhibits. On July 7, 2020. ORS filed the Second Rehearing Direct Testimony of Mark Rhoden as well as the Second Rehearing Direct Testimony and Exhibits of Dawn M. Hipp. Despite having asserted the Commission must take additional evidence before issuing an order following the second remand (*see* Letter, Pringle to Hon. Boyd, January 16, 2020), the Intervenors did not prefile any testimony or exhibits.

Prior to the hearing scheduled for September 3, 2020, ORS served additional discovery on DIUC, filed a letter requesting that DIUC provide additional notice to its customers, and then filed a Motion for Clarification and to Hold the Remaining Procedural Due Dates in Abeyance Pending a Commission Order. Pursuant to Order 2020-69H, entered on July 16, 2020, the remaining pre-filing deadlines were held in abeyance. Over the next few months the parties briefed and presented oral argument to the Commission regarding several procedural issues generally related to the scope

of discovery and DIUC's position that it had provided ample evidence regarding DIUC's requested Rate Case Expenses.

In December 2020, DIUC filed updated discovery responses required by the Commission. Then, via letter filed January 7, 2021, DIUC reported the parties had conferred and jointly requested a hearing be scheduled for the Commission to hear testimony and evidence on the issues remaining after the second remand from the Supreme Court. *See* Letter, Gressette to Hon. Boyd, January 7, 2021. Pursuant to several directives issued by the Standing Hearing Officer, deadlines were set for the filing of remining testimony and a hearing was scheduled for March 2 and 3, 2021.

Prior to the scheduled hearing, the parties reached agreement as to settlement terms which they jointly proposed to the Commission by the filing of a Settlement Agreement on February 18, 2021, and a Proposed Consent Order Approving Settlement on February 19, 2021. DIUC and ORS also both submitted prefiled testimony in support of the proposed settlement and consent order.

On February 25, 2021, the Commission convened a settlement hearing wherein the Commission considered the Settlement Agreement and the testimony of settlement witnesses for DIUC and for ORS. Via Order 2021-132, entered March 30, 2021, the Commission approved the Settlement Agreement finding it is "just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest." Order 2021-132 at p. 7. Pursuant to the Order, DIUC was permitted to "implement the 2021 Rates, (as defined in the Settlement Agreement and reflected in the attachments thereto) for services beginning March 1, 2021," and to "include the same in its April 1, 2021, quarterly billing." *Id*.

The substantive terms of the Settlement Agreement are:

Annual Revenue:
The parties agree to implementation of the 2021 Rates as set forth in the Settlement Agreement and its exhibits. The 2021 Rates are designed and intended to generate $2,267,714 of annual revenue for DIUC [ie, the originally requested 108.9% increase].

Rate Case Expenses:
In addition to the $272,382 of rate case expenses previously recommended for recovery by ORS, approved by the Commission in Order No. 2018-68, and currently reflected in rates charged to customers, the Parties agree to recovery of $542,978 for Guastella Associates' rate case expenses incurred by DIUC through September 30, 2017, and supplemental legal rate case expenses of $95,430, with both amounts to be amortized over a three (3) year period.

Rate Base / Utility Plant in Service:
DIUC's Application included $8,139,260 of reported used and useful facilities included in Utility Plant in Service. Commission Orders 2015-846 and 2018-68 both reduced that amount by $699,361. DIUC will delay seeking recovery of the corresponding $699,361 until its next rate filing, and the Parties agree to reserve their positions as to the $699,361 reduction to Utility Plant in Service for consideration in DIUC's next rate case.[2]

Reparations:
DIUC asserts the temporary rates permitted by Order 2015-846's rate increase of 43%, which was mitigated but not corrected by Order 2018-68's further changes permitting a rate increase of 88.5%, were confiscatory. DIUC seeks reparations to recoup through a surcharge its shortfall in revenues and return with interest accumulating until the surcharge becomes effective, back to its January 2018 billing for service provided for the last quarter of 2017, until its first billing following a final decision on the recoupment issue. DIUC also seeks reparations to recoup through a surcharge the credit/refund made in its January 2018 billing for the difference between the 88.5% increase and the 108.9% increase that had been in effect during the first appeal with interest accumulating until the surcharge becomes effective. ORS and the Intervenors disagree, so the settlement contains a procedure whereby after the Commission's decision regarding the proposed settlement

[2] Even if the parties were in agreement about including the $699,361 in Utility Plant In Service, that would result in rates that exceed the noticed revenue of $2,267,722 [aka the 108.9% increase].

> agreement, the parties can brief the matter to the Commission for its further determination in this case.

Order 2021-132, Settlement Agreement at pp. 2-4.

As indicated by the terms of the Settlement Agreement, ORS and the Intervenors agreed that the settlement "serves the public interest," as that term is defined by S.C. Code Ann. § 58-4-10(B), and that it is "is reasonable, in the public interest, and in accordance with law and regulatory policy." Settlement Agreement at pp. 5-6. Likewise, in Order 2021-132, the Commission found that "the Settlement Agreement is just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest." Order 2021-132 at p. 7.

Pursuant to the briefing procedure referenced in Order 2021-132, DIUC submits this Briefing.

DISCUSSION

1. ORS AND INTERVENORS NOW AGREE DIUC'S ORIGINAL APPLICATION SOUGHT JUST AND REASONABLE RATES.

In its original Application, DIUC sought a 108.9% increase in its rates in order to generate additional revenue of $1,182,301, which would have increased DIUC's total adjusted revenue to $2,267,722. ORS and the Intervenors opposed that increase and convinced this Commission to accept a Settlement Agreement allowing only a 43% rate increase. *See* Order No. 2015-846. DIUC appealed the order. ORS and the Intervenors continued to assert the request increase was unsupported. DIUC expending significant resources and time to achieve a favorable ruling from the Supreme Court, reversing Order 2015-846.

The matter returned to the Commission on remand. Upon rehearing ORS and the Intervenors continued to oppose the Application's requested increase, and even sought further discovery over DIUC's objections. This discovery increased DIUC's costs and delayed the

rehearing. At the eventual rehearing ORS and the Intervenors continued to oppose DIUC's requested increase and DIUC's proposed revenue requirement. The Commission again accepted ORS's and the Intervenor's positions causing DIUC to expend even more resources and time to obtain another reversal through appeal to the Supreme Court.

The case was again remanded to the Commission for a third hearing. ORS propounded more discovery and another year passed. Then, with a third hearing looming, ORS and the Intervenors finally agreed to settle the case and in doing so affirmed that the full 108.39% increase sought all along by DIUC is "just, fair, and reasonable, [and] it is in accord with applicable law and regulatory policy."[3] Settlement Agreement at pp. 5-6; *see also* Order 2021-132.

So, finally, ORS and the Intervenors agree to the Application's requested revenue but not until after they have cost DIUC six years of legal and consulting fees and lost return without the adequate rates. However, ORS and the Intervenors also take the position that DIUC should be denied these rates in reparations. ORS and the Intervenors want this Commission to rule that because ORS and the Intervenors were able to extend this case by six years of costly litigation, they have somehow earned the right to delay implementation of the rates they have now agreed are "just, fair, and reasonable, [and] it is in accord with applicable law and regulatory policy." Such a result is contrary to both federal and state law.

2. CONSTITUTIONAL PROTECTIONS REQUIRE THE RELIEF SOUGHT BY DIUC.

The length of this case and the costs DIUC has had to expend to pursue two appeals cannot be wholly addressed by implementation of the 2021 Rates per the Settlement Agreement. Over

[3] Notably, DIUC's original Application sought $2,267,722. The Settlement revenue number is $2,267,714 -- only $8 *less* than the original Application after over six years of litigation required by the ORS and Intervenors' objections to this amount.

the past six years of this proceeding, DIUC has been placed in an inferior position because of the extensive delays in obtaining a final, proper rate ruling. Therefore, DIUC is entitled to recoup the lost revenues that it should have been able to collect, as set forth in the *Remediation / Reparation Schedule (May 17, 2021)* filed herewith as *Exhibit A*.

This conclusion is grounded in the well-established principle that a utility like DIUC has a constitutional right to collect rates that meet minimum constitutional standards of a reasonable return on investment. *See Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107 at n.8, 708 S.E.2d 755, 761 (2011) (citing *Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of W. Va*., 262 U.S. 679, 690, 43 S. Ct. 675 (1923) (explaining that where the rates allowed for a public utility company "are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service…their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."). Complying with this constitutional due process requirement is mandatory and the reasoning is sound – when a utility invests in equipment and real property for use in providing service, the utility is allowed to charge rates sufficient to allow it to operate and maintain that plant in service.

"The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service, and rates not sufficient to yield that return are confiscatory." *Bd. of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31, 46 S. Ct. 363, 366 (1926) (citing *Willcox v. Consolidated Gas Co.,* 212 U. S. 19, 29 S. Ct. 192 (1909) and *Bluefield Waterworks*, 262 U. S. 679, 43 S. Ct. 675. Rates are confiscatory if they do not address the cost of property of the utility and all sums required to meet operating expenses. *Bluefield Waterworks*, 262 U.S. at 691, 43 S. Ct. at 678.

Applying the principle here, DIUC's insufficient rates since Order 2015-846's increase of only 43%, which was mitigated but not corrected by Order 2018-68's 88.5% increase, have not provided DIUC its constitutionally guaranteed just compensation for its property used and its operating expenses, given the duration of this rate proceeding. Again, "what the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." *Bluefield*, 262 U.S. at 690, 43 S. Ct. at 678; *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308, 109 S. Ct. 609, 616 (1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.").

In the years following *Bluefield*, up until the Supreme Court's 1944 decision in *Federal Power Com'n. v. Hope Nat. Gas Co.,* 320 U.S. 591, 64 S. Ct. 281 (1944), "the courts engaged in a detailed review of each of the three major components used in determining a utility's maximum rates: (1) its rate base; (2) the allowed rate of return; and (3) operating expenses" to determine if rates were confiscatory. *See* James M. Van Nostrand, *Constitutional Limitations on the Ability of States to Rehabilitate Their Failed Electric Utility Restructuring Plans*, 31 Seattle U. L. Rev. 593, 596 (2008). In *Hope*, however, the Supreme Court articulated a much more flexible approach aimed at evaluating the actual impact of rates upon a utility. The Court explained that "when the Commission's order is challenged in the courts, the question is whether that order viewed in its entirety" meets constitutional muster. *Hope Nat. Gas Co.*, 320 U.S. at 602, 64 S. Ct. at 287–88 (internal quotations omitted).

While the Court also acknowledged that commissions will make adjustments to an application for rate relief, those adjustments *must* be "pragmatic adjustments." *Id.* Therefore, when reviewing a rate order's impact by looking at the order in its entirety to determine whether

the rate order is "just and reasonable," the focus of a reviewing court is to be upon "the result reached not the method employed" to achieve the result. *Hope Nat. Gas Co.*, 320 U.S. at 602, 64 S. Ct. at 287 (holding "the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling"); *see also Duquesne Light Co.*, 488 U.S. at 310, 109 S. Ct. at 617 ("Today we reaffirm these teachings of *Hope Natural Gas:* "[I]t is not theory but the impact of the rate order which counts.").

Applying this result-based analysis to the rates at issue in any case, including this one, requires the reviewing body to address "the financial integrity of the company whose rates are being regulated … [because] from the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business." *Hope Nat. Gas Co.*, 320 U.S. at 603, 64 S. Ct. at 288. This includes evaluating whether the rates provide for sufficient "service on the debt" and also the impact of the rates upon "dividend on the stock" of the utility. *Id.* (citing *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 346, 12 S.Ct. 400, 402 (1892). To be constitutionally appropriate, the ultimate result of the rates permitted DIUC must be "a return to the equity owner [that is] commensurate with returns on investments in other enterprises having corresponding risks." *Id.* "That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Id.* (citing *State of Missouri ex rel. South-western Bell Tel. Co. v. Public Service Commission*, 262 U.S. 276, 291, 43 S.Ct. 544, 547 (1923) (Brandeis, concurring). Again, the adjustments creating the rates must be pragmatic. *See Hope Nat. Gas Co.*, 320 U.S. at 602, 64 S. Ct. at 287–88.

In South Carolina the Supreme Court has endorsed the pragmatic (ie, practical) approach to reviewing a rate's overall impact upon a utility. For example, in *S. Bell Tel. & Tel. Co. v. Pub.*

Serv. Comm'n, 270 S.C. 590, 597, 244 S.E.2d 278, 281 (1978) the Court quoted *Hope Nat. Gas Co.*:

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on debt and dividends on the stock…. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

In 1989 the United States Supreme Court decided *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), and again reaffirmed the ongoing importance of the comparable earnings standard first enunciated in *Bluefield. See* Van Nostrand, 31 Seattle U. L. Rev. at 600. "This test states that the 'return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.'" *Id.* (citing *Duquesne Light, 488 U.S. at 310*). Accordingly, "[e]ven though the actions of the Pennsylvania PUC [addressed by the Supreme Court in *Duquesne Light Co. v. Barasch*] did not result in a constitutionally impermissible rate," the Supreme Court's decision in *Duquesne* "clarified and confirmed the ability of a utility to assert Takings Clause claims" in order to protect "the utility from the net effect of the rate order on its property."[4]

The record in this case, previous testimony, and the attached and incorporated Affidavit of John F. Guastella in Support of Reparations demonstrate the rates permitted in this case were constitutionally insufficient and, as such, the requested relief is necessary to remedy violation

[4] *Id.* (citing *Duquesne Light*, 488 U.S. at 314 (citing *Bluefield Water*, 262 U.S. at 692-93 ("A public utility is entitled to such rates as will permit it to earn a return ... equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.")).

DIUC's federal and state constitutional rights.[5] As specifically set out in the Affidavit of Mr. Guastella, attached hereto as *Exhibit A*:

- The deficient rates prior to March 1, 2021, violate the protections guaranteed to DIUC by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 3 and 13 of the South Carolina Constitution";
- The rates permitted in this matter were not "sufficient for DIUC to earn a reasonable rate of return";
- The insufficient rates permitted "have negatively impacted the financial integrity of DIUC and failed to generate sufficient revenue for payment of all expenses, debt service, and capital costs of the business";
- The inadequate rates "failed to allow the owner of DIUC to earn a return upon equity commensurate with returns on investments in other enterprises having corresponding risks"; and
- The permitted rates "were not sufficient to assure confidence in the financial integrity of the utility, so as to maintain its credit and to attract capital."

Exhibit A, Affidavit of John Guastella at ¶14.

This Commission should remedy the violations by granting the requested relief thereby concluding this matter and avoiding further litigation related to these issues.

4. S.C. CODE § 58-5-240(D) DOES NOT SUPPORT THE EXTREME RESULT ORS SEEKS.

To date, ORS has objected to the relief herein requested by citing to S.C. Code § 58-5-240(D). Specifically, ORS asserts that "because DIUC chose not to put its requested (applied for) rates into effect under bond pending resolution of the second appeal, it cannot collect revenues

[5] If a utility regulatory commission fails to grant rate relief in an amount adequate to provide a utility with an opportunity to earn a reasonable return, or denies recovery on a specific utility investment [then the utility's claim is a constitutional claim based on the Takings Clause].") *See, e.g.*, Van Nostrand, 31 Seattle U. L. Rev. at 595.

from its customers going forward which it claims to have lost as a result of its decision to not post a bond while the current appeal was pending." Settlement Agreement at p. 4.

Long before the Commission adopted the original ORS-Intervenors Settlement Agreement in Order 2015-846, DIUC informed the Commission and ORS that under ORS's proposed rates DIUC could not meet its obligations. *See* DIUC Brief, App. No. 2016-000652 at 25 (quoting Guastella testimony that "We're not going to have any return on equity, and we're not going to be able to make our debt service payments of principal and interest. It would put us right into bankruptcy. We need to have a real decision based on our real costs.") In order to survive, DIUC obtained a bond pursuant to S.C. Code § 58-5-240(D) which permits an appealing utility to "put the rates requested in its schedule into effect under bond … during the appeal and until final disposition of the case."

By the time the Commission was entering its first Order on Rehearing, DIUC had obtained its first bond, then a second renewal bond that required a letter of credit supported by one of its owners, but the second bond was expiring on December 31, 2017 and it was impossible for DIUC to obtain another rate collection bond. DIUC had no choice but to implement whatever rate increase the Commission would allow so it could become effective by the January 1, 2018 billing for service provided during the last quarter of 2017. Aware of DIUC's dilemma, on December 20, 2017 the Commission issued its approval of the 88.5% rate increase to be billed with the January 1, 2018 billing.

ORS has asserted that DIUC should not be allowed to collect the requested reparations and/or refunds because DIUC "*chose* not to put its requested (applied for) rates into effect under bond" during the second appeal and subsequent remand and that DIUC's "*decision* not to post a bond" bars DIUC from being made whole. The problem with this assertion is that DIUC had no

choice about obtaining additional bonds. Because ORS has put DIUC through two years of litigation, ORS effectively exhausted all reserves and DIUC could not obtain further bonds.[6]

The Commission approved DIUC's first bond to be "effective July 1, 2016, for a period of one year. See Order 2016-56, March 1, 2016, at p.4. When the bond neared expiration on June 30, 2017, and the first appeal was still pending, the parties agreed to terms for extending a bond for six months, to expire on January 1, 2018. *See* Order 2017-402(a) at p. 2. However, DIUC had no options for further bonds beyond January 1, 2018. It could not renew it previous bonds to cover rates already collected under bond and it could not afford any new bonds to allow collection of future rates under an appeal bond.

DIUC explained to the Commission and submitted an Affidavit from Mr. Guastella establishing the facts:

> [T]he surety company is not willing to provide another bond. *See* Guastella Affidavit. In an attempt to obtain bonds, Mr. Guastella contacted Danny Sellers of Insurance Office of America to request a pre-determination of availability of bonds for any post- December 31, 2017, time period. Mr. Sellers arranged for all the previous bonds for DIUC in this matter; however, he responded flatly that there would be no additional bonds issued in this case. *See Attachment A* to Guastella Affidavit ("Our last effort on this was the maximum allowed from the Surety. Sorry we could not be of help.")
>
> In addition to the bonding company's refusal to participate in any additional bond(s) post-December 31, 2017, the prerequisites to obtaining the most recent bonds included substantial financial information, actions, and financial commitments from individuals and entities beyond the control of DIUC. As explained by the Affidavit of Mr. Guastella, those additional funds are no longer available for DIUC's use after December 31, 2017. Also, SunTrust has indicated it will not extend any further credit to DIUC until after this rate case concludes. *See Attachment B* to Guastella Affidavit. So, DIUC cannot provide the security that was originally required for the issuance of the bonds. That does not begin to address the additional bonds that would be necessary to cover rates collected after December 31, 2017. In sum, as the sworn testimony of Mr. Gusatella's Affidavit states, "DIUC

[6] The premiums and banking charges paid by DIUC for these bonds total in excess of $60,000. *See* Affidavit of Guastella, October 16, 2017, at p.3, filed with Motion to Reconsider Directives 2017-59-H and 2017-60-H with.

> is not able to renew its existing bonds or obtain additional bonds for rates charged after December 31, 2017."

Motion to Reconsider Directives 2017-59-H and 2017-60-H with Affidavit of Guastella, October 16, 2017, at p.3.

Having successfully spent DIUC's reserve so that DIUC could not afford to purchase bonds for the second appeal, ORS now wants this commission to blame DIUC for not *choosing* to obtain further bond after the second order on rehearing. To be clear – ORS is actually asking the Commission to rule that ORS can oppose adequate rates for a utility extended periods of time, nearly six years into DIUC's case, thereby forcing the utility to expend its resources on multiple appeals but when the Supreme Court actually rejects every single position asserted by ORS and the case returns on its second remand, the utility must absorb the loss from its inadequate rates unless the utility was somehow able to pay for appeal bonds pursuant to S.C. Code § 58-5-240(D). ORS wants the Commission to enter this ruling, despite the fact that it would enforce another denial of DIUC's 14th Amendment right to procedural due process. ORS wants permission to financially exhaust a utility with appeals then deny the utility any meaningful way to apply to recoup the confiscatory bottom line earnings caused by ORS. Surely that is not the result this Commission supports.

5. THE RELIEF SOUGHT BY DIUC IS NOT RETROACTIVE RATEMAKING.

ORS also opposes the reparations and refunds sought by DIUC based on a theory that the requested relief implicates retroactive ratemaking and "that retroactive ratemaking is prohibited based on the principle that customers who use service provided by a utility should pay for its production rather than requiring future customers to pay for past use." Settlement Agreement at

pp. 4-5 (citing *S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 272 S.E.2d 793 (1980)). ORS's position, however, is flawed.

"The basic premise underlying the prohibition against retroactive ratemaking is that the setting of utility rates is a legislative function, even if carried out by administrative agency; therefore, utility rates, like any other legislation, generally can have only prospective application…." 73B *C.J.S. Public Utilities* §141. Disputes over whether a rate has been applied retroactively can be related to a utility's claim that its rates or revenues are being reduced retroactively or related to a customer's claim that a rate is artificially increased to improperly address some past deficit of the company.

The issue currently before the Commission is DIUC's request for reparations and refunds made necessary by the length of this proceeding and the impact of the two appeals. DIUC asserts the temporary rates permitted by Order 2015-846's rate increase of 43%, which was mitigated but not corrected by Order 2018-68's further changes permitting a rate increase of 88.5%, were confiscatory. *See* Constitutional Protections Require the Relief Sought by DIUC, *supra*, and Order 2021-132 at pp. 4-6. DIUC also asserts that the circumstances of this case are unique. Given the positions ORS has taken, the rulings of the Supreme Court, and the length of the proceeding (which is still ongoing), this Commission ought to have no hesitation in approving the requested relief which would prevent DIUC from being punished for circumstances it did nothing to create.

Although South Carolina courts have not yet addressed this specific issue, other courts have found that making a prevailing party whole following a successful appeal is not retroactive ratemaking. For example, in *R.R. Comm'n of Texas v. High Plains Nat. Gas Co.*, 628 S.W.2d 753, 754 (Tex. 1981), the Supreme Court of Texas found that "allowing the utility to recover the incremental expenses lost as a result of the improperly mandated ninety percent PGA clause is not

retroactive rate relief but restitution of a lost operating cost" that the utility would have been recovering but for the erroneous order reversed on appeal.

The Supreme Court of North Carolina has also ruled in support of refunds after an appeal (this time for a ratepayer, though the same reasoning applies here). The Court reasoned that ruling against refunds would deny adequate relief appellants who appeal from erroneous orders of the Commission. *See State ex rel. Utilities Comm'n v. Conservation Council of N. Carolina*, 312 N.C. 59, 68, 320 S.E.2d 679, 686 (1984). Addressing the issue of retroactive ratemaking, the North Carolina Supreme Court focused on the distinction that there can be no retroactive ratemaking until a rate is final. The Court explained, "If the Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been 'lawfully established' until the appellate courts have made a final ruling on the matter." *Id*. at 67, 685. Therefore, a restitution payment like the one sought here by DIUC cannot by definition be retroactive ratemaking because the rates are not finally established until the appellate process is complete. It should also be noted that ORS and the Intervenors have both agreed "that this proceeding, Docket No. 20l4-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary." Order 2021-132, Order Approving Settlement Agreement and Further Procedure, at pp. 4-6 with Settlement Agreement.

The Supreme Court of New Hampshire has also ruled that the implementation of new rates following appeal does not involve a retroactive application of the law or retroactive ratemaking. In *Appeal of Granite State Elec. Co.*, 120 N.H. 536, 539, 421 A.2d 121, 122–23 (1980), the Court held that "the substitution of new rates in accordance with this court's order for those required by the PUC's earlier order does not involve a retroactive application of the law. Until the rate had

become final, the rate established by the PUC had not become tantamount to a statute which could not be amended retrospectively." Likewise, here, there has yet to be a *final* rate such that the concept of retroactive ratemaking would be implicated. Notably, the Court also ruled that the concepts of restitution and unjust enrichment support refunds when a rate decision is altered on appeal:

> In this context, the terms "restitution" and "unjust enrichment" are modern designations for the older doctrine of quasi-contracts, and the action, for "unjust enrichment," therefore, lies in a promise implied by law, that one will restore to the person entitled thereto that which in equity and good conscience belongs to him. A refund order is consistent with general principles of restitution requiring the return of property after a judicial determination that it was improperly acquired

Id. at 539-40, 123 (citing 17 *C.J.S. Contracts* s 6 (1963); *Bloomgarden v. Coyer*, 479 F.2d 201, 211 (D.C.Cir.1973); and *Cecio Bros., Inc. v. Town of Greenwich,* 156 Conn. 561, 244 A.2d 404 (1968). Again, as with the previously cited cases, further and varied support exists for the requested relief, which is not, as ORS asserts, improper retroactive ratemaking.

The conclusion that DIUC's requested relief does not implicate retroactive ratemaking is further supported by the South Carolina Supreme Court's ruling in *DIUC I* wherein the Court announced:

> Furthermore, we take this opportunity to overturn *Parker v. South Carolina Public Service Commission*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), to the extent it holds the Commission may consider new evidence on remand only if explicitly authorized to do so by an appellate court. We now hold that a remand to the Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence. Rate cases are heavily dependent upon factors which are subject to change during the pendency of an appeal, thus it serves no purpose to bind parties to evidence presented at the initial hearing which may no longer be indicative of the current economic realities on remand.

DIUC I, 420 S.C. 305, 316, 803 S.E.2d 280, 286 (2017). The South Carolina Supreme Court, then, requires the Commission on remand to apply a procedure that is based on the premise that the rate

order appealed is not final; additional evidence can be provided as the parties are not bound by the previous record.

6. WITHOUT RESTITUTION/REPARATIONS DIUC WILL NOT RECEIVE THE BENEFITS OF JUDICIAL REVIEW.

Without the requested relief, DIUC will have been denied constitutionally appropriate rates as well as the benefit of meaningful judicial review. *See Pennwalt Corp. v. Michigan Pub. Serv. Comm'n*, 109 Mich. App. 542, 546, 311 N.W.2d 423, 425 (1981) (citing *Mountain States Telephone & Telegraph Co.,* 180 Colo. at 81-82, 502 P.2d at 949 and *Mountain States Telephone & Telegraph Co. v. Arizona Corp. Comm.,* 124 Ariz. 433, 436, 604 P.2d 1144, 1147 (Ariz.App., 1979). The Supreme Court of Illinois agrees, and in *Indep. Voters of Illinois v. Illinois Com. Comm'n*, 117 Ill. 2d 90, 104, 510 N.E.2d 850, 857 (1987), explained why, holding that after a rate order is judicially set aside, it would be unfair for the party losing the appeal to "continue to benefit from what has been determined to be unlawful portions of a rate increase." Even though the statutory provisions in effect in Illinois at the time did not include a specific provision addressing remand refunds/restitution after judicial review, the Court ruled that such a remedy must be available; the absence of such remedies would, according to the Court (and as DIUC asserts here), "raise due process questions." *Id.* (citing *Appeal of Granite State Electric Co.*, 120 N.H. at 540, 421 A.2d at123 (allowing refunds for the entire period that the rate order was in effect)).

If DIUC is not permitted reparations to address the shortfall in revenues and return created by, among other things, the length of this proceeding and the seed for judicial review, then DIUC will not be able to realize the full benefits of judicial review. Failing to grant the requested relief would be contrary to the constitutional rights of DIUC.

CONCLUSION

Because of the delays of this proceeding, DIUC did not collect sufficient revenues to cover operating expenses and a reasonable return on investment as far back as DIUC's January 1, 2018, billing for service provided in the last quarter of 2017. S*ee* December 20, 2017, Directive (approving 88.5% rate increase, aka approximately $950,166 in additional revenues). DIUC now seeks only what is fair and reasonable and that to which it is constitutionally entitled. Without the reparations and restitution herein sought, DIUC will be denied nearly three and one-half years of revenue from and return from the rates, despite the fact that the ORS, Intervenors, and Commission have all now approved those rates.

ORS and the Intervenors want this Commission to rule that because ORS and the Intervenors were able to extend this case by six years of costly litigation, they have somehow earned the right to delay implementation of the rates they have now –finally– agreed are "just, fair, and reasonable, [and] it is in accord with applicable law and regulatory policy." Such a result is contrary to both federal and state law.

Approving this restitution is not retroactive ratemaking but is, instead, the mechanism with which to properly restore the utility to the financial position it would be in if the existing rates had been billed instead of the January 1, 2018, rates providing an 88.5% increase.

The relief is justified and necessary to provide DIUC with meaningful judicial review and implementation in compliance with federal and state constitutional guarantees. DIUC has a constitutional right not to have its proper revenue and return forfeited just because it took ORS and the Intervenors two appeals.

Respectfully submitted,

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May 17, 2021
Charleston, South Carolina

Exhibit A, Remediation / Reparation Schedule (May 17, 2021)
Exhibit B, Affidavit of John F. Guastella

CERTIFICATE OF SERVICE

This is to certify that on May 17, 2021, I caused to be served upon the counsel of record named below a copy of DIUC's Submission in Support of Request for Reparations via electronic mail, as indicated. A copy of the Response was also filed via the Commission's DMS.

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